

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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FILE: B-183658

DATE: August 7, 1975

MATTER OF: Ainslie Corporation

DIGEST:

1. Request for recommendation that RFP be canceled and that sole source award be negotiated with protester who allegedly cannot effectively compete under RFP is denied since contracting officer's determination to competitively negotiate was reasonable in light of mandate of 10 U.S.C. § 2304(g), to obtain maximum competition and fact that competition exists since at least two firms are capable of competing under RFP.
2. Request that IFB for electrical shelters be reinstated under which award had been made to one of protester's competitors and subsequently terminated for convenience of Government is not recommended because agency committed itself in terms of substantial engineering effort and money to adapting a different type of electrical shelter to program requirements. Therefore, Government's minimum needs have changed and electrical shelters under IFB no longer satisfy those needs.
3. For purposes of granting relief, GAO cannot consider equities of situation where protester has allegedly been effectively precluded from competing in procurement without specific statutory authority. There is no such statutory grant of authority applicable to protester's request for relief.
4. Fact that agency did not substantially comply with representation made to United States District Court regarding intent to meet needs in-house rather than procure outside of Government is matter properly for consideration of Court, and no opinion is expressed thereon.

The Ainslie Corporation (Ainslie) protests award of any contract under request for proposals (RFP) N00228-75-R-2268 issued by the Naval Supply Center, Oakland, California, for 22 electrical equipment shelters S-280 ()/G (107 shelters).

This protest has its genesis in a previous procurement by the Naval Regional Procurement Office, Long Beach, California (NRPO), for 20 AN/TSQ108() electrical equipment shelters (108 shelters). On March 27, 1974, the NRPO issued invitation for bids N00123-74-B-1758. As of the June 13, 1974, bid opening Ainslie was the low bidder by approximately \$200,000. On June 14, 1974, the next low bidder, Craig Systems Corporation (Craig) protested to the Navy and our Office that Ainslie's bid was nonresponsive because it offered only 19 shelters rather than the required 20. The Navy, without notifying Ainslie of the protest, determined Ainslie's bid nonresponsive and, on July 25, 1974, awarded the contract to Craig.

On August 5, 1974, Ainslie learned of the events that had transpired and filed a protest against any award to Craig on August 6, 1974. On August 8, 1974, the Navy formally notified Ainslie that its bid had been rejected and the contract awarded to Craig. Thereafter, Ainslie filed a complaint in the United States District Court, District of Massachusetts (District Court) (Civil Action No. 74-3035-C) for, inter alia, a declaratory judgment that the Navy unlawfully awarded the contract to Craig rather than Ainslie and a temporary restraining order as well as a preliminary injunction restraining the Navy from proceeding with the Craig contract. In a Memorandum and Order dated September 10, 1974 (Ainslie Corporation v. Middendorf (USDC, D. Mass. 1974)) 381 F. Supp. 305, the District Court enjoined the parties defendant by setting aside the contract awarded to Craig and temporarily restraining Craig from proceeding with any work under the contract, pending further notification from the District Court.

Subsequently, an October 2, 1974, affidavit was submitted to the District Court by the Electronics Engineer and Executive Manager of the Radar and Sonar Surveillance Central Production task (Engineer) in the Naval Electronics Systems Engineers Center (NAVELEX), San Diego, California. The Engineer's affidavit indicated that the contract with Craig was being terminated for the convenience of the Government and "any procurement under that solicitation [IFB -1758] is being cancelled." It was further represented that the need for the 108 shelters would be satisfied out of articles then in Navy stock. There were a number of 107 shelters in the NAVELEX Vallejo stock contemplated for the Marine Corps Air Traffic Control Unit Program which appeared

to be uncommitted due to funding problems. Certain modifications to the 107 shelters would render them suitable for use instead of the 108 shelters. The modifications would be done in-house and replenishment of stock of the 107 shelters would be based upon the original 107 shelter specifications.

According to Ainslie, on October 30, 1974, the above injunction was dissolved and the Order of September 10, 1974, was vacated on the basis of the affidavit. The complaint was dismissed on December 9, 1974, after a hearing on a Motion to Dismiss filed by the Government.

The Navy maintains that the decision to modify the 107 shelters, instead of resoliciting for bids for the 108 shelters, was necessitated by the August 1975 need for the shelters. Owing to the time necessary to procure the shelters, it was felt that borrowing and modifying the 107 shelters was the most expedient method. (We note here the record contains no indication that this course of action was unacceptable either to the District Court or Ainslie.) Consequently, on October 25, 1974, the Commanding Officer, NAVELEX, San Diego, requested his counterpart in Vallejo to ship 21 (in stock) 107 shelters for adaptation into the original 108 shelter program, with funding forthcoming. By memorandum of November 26, 1974, the Commanding Officer, NAVELEX, Vallejo, responded that it could loan only two 107 shelters for use in fabricating a prototype. It was further indicated that upon receipt of the necessary funds, Vallejo would procure twenty-one 107 shelters, two of which would replace the loaned 107 shelters.

On December 6 and 7, 1974, the Navy states that Vallejo shipped seventeen 107 shelters to the Sacramento Army Depot for work in preparation for their use in the Marine Corps program as originally intended due to the acquisition of funding. The initial funding document for this task was issued by Vallejo on November 7, 1974, in the amount of \$170,000.

It is this depletion of Vallejo's stock of 107 shelters for the Marine Corps program that necessitated the instant procurement to satisfy the need for 107 shelters to be modified for the original 108 shelter program covered by IFB -1758. That action was initiated by requisition on February 20, 1975, which culminated in the protested procurement, RFP -2268 for twenty-two 107 shelters. While the RFP was synopsized in the

Commerce Business Daily, a copy of the RFP was inadvertently not sent to Ainslie. This inadvertence occurred, according to the Navy, because Ainslie was not a source of 107 shelters known to the procuring activity handling this procurement, the Regional Procurement Department, Naval Supply Center, Oakland, California (NRO). A copy of the RFP was forwarded to Ainslie upon request and the procurement suspended to permit its participation. Thereafter, by letter of April 14, 1975, Ainslie protested to GAO.

Ainslie's protest ties together the prior and present procurements and the court action. Briefly stated, Ainslie views the present procurement for 107 shelters as a subterfuge by the Navy to avoid its commitment to the District Court that the Navy's requirements would be satisfied without resort to public procurement. That is, in order to originally avoid awarding a contract to Ainslie under the original IFB, the Navy represented to the District Court that the procurement would be satisfied through in-house modifications of similar in-stock items (107 shelters). Upon the strength of this representation, Ainslie ceased to pursue its available remedies to its prejudice.

There is no question that the issuance of RFP -2268 is to satisfy the Navy's original needs for 108 shelters covered by IFB -1758. Ainslie alleges it cannot effectively compete for the 107 shelters, whereas, it would be in a position to be competitive for the 108 shelters. Ainslie's impediments to effective competition are attributed to the first article testing requirement and the delivery schedule. Ainslie states that it is ineligible for waiver of the first article testing requirements because it has not previously built the 107 shelters. On the other hand, the two other firms solicited both qualify for first article testing waiver by virtue of prior production.

This situation is further compounded because further production testing is required of competitors that did not qualify for first article waiver. The costs and time consumed for conducting the tests, in Ainslie's opinion, would render any effort to compete useless from both a cost standpoint and ability to meet the required delivery schedule. Ainslie maintains that it could realistically compete for the 108 shelters since no firm qualifies for a waiver of first article tests. Thus, Ainslie requests that we either (a) recommend the instant RFP be canceled and a sole source contract be negotiated with Ainslie; or (b) recommend

reinstatement of IFB -1758, under which Ainslie was the apparent low bidder, and direct award of a contract to Ainslie.

For the reasons that follow, we decline to recommend the requested relief. With regard to the first request, 10 U.S.C. § 2304(g) (1970) provides, in part:

"In all negotiated procurements in excess of \$10,000 in which the rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, * * *"

The following are illustrative of situations where we have countenanced restrictions on competition and consequent sole source awards: (1) bona fide exigencies exist that can only be met by one concern (Stewart-Warner Corporation, B-182536, February 26, 1975); (2) unwarranted technical risks would exist if the procurement were competed (54 Comp. Gen. 231 (1974)); (3) technical compatibility is necessary to insure the integrity of a system (North Electric Company, B-182248, March 12, 1975); (4) it is impossible to draft an adequate specification (H.J. Hansen Company, B-181543, March 28, 1975); and (5) it is impracticable to obtain competition and only a sole source of supply is available (see 10 U.S.C. § 2304(a)(10) and Armed Services Procurement Regulation (ASPR) § 3-210.2(a) (1974 ed.)).

In determining the propriety of sole source awards, we apply the test of reasonableness to the contracting officer's determination. North Electric Company, supra. As we would weigh a contracting officer's determination to award a contract sole source, we similarly weigh the contracting officer's decision to seek competition against a standard of reasonableness. Clearly, competition is the preferred method of procurement. In the instant case, there are at least two firms capable of competing

on RFP -2268 for the 107 shelters. In this light, the decision to procure the shelters competitively is in consonance with the statutory mandate of Congress and clearly compatible with the circumstances.

It is unfortunate that Ainslie believes it cannot now effectively compete for the 107 shelters. However, subsequent to the prior District Court action, the Navy committed itself, in terms of substantial engineering effort and money, to adapting the 107 shelters for use instead of the 108 shelters. The Navy reports that the engineering and production efforts to adapt the 107 shelters to meet the 108 shelter operational requirements have covered a 9-month period at a cost of \$372,500. A retrogression to the 108 shelters would result in an 8-month program delay along with approximately \$134,000 in additional engineering costs.

At the present juncture, we cannot say that it would be in the Government's best interests to abandon that effort and revert to the 108 shelters. In this vein, the Navy has alleged that almost none of its adaptation efforts could be recouped. Thus, the Navy's minimum needs have changed and the 108 shelters no longer satisfy those needs. It is for this reason that we cannot recommend reinstatement of the former IFB and award to Ainslie. We iterate our notation above that the adaptation of the 107 shelters was apparently acceptable to the District Court and Ainslie.

The only considerations that we perceive which would permit us to accede to Ainslie's requests are equitable. We exercise equitable jurisdiction only where specifically empowered by statute. The R. H. Pines Corporation, B-181599, December 26, 1974; 46 Comp. Gen. 874 (1967). There is no such statutory grant of authority applicable to Ainslie's request.

Further, the fact that the Navy did not substantially comply with the representation made to the District Court that the 107 shelter requirements would not necessitate procurement outside the Government is properly for consideration by the District Court. Therefore, we express no opinion on that matter.

The protest is denied.


Deputy Comptroller General
of the United States